IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.5004 OF 1996

Larsen and Toubro Grahak Sahakari
Sanstha Maryadeet,
Saki Vihar Road, Bombay 400 072. Petitioner

vs.

1. Tanaji Kashinath Vishwe,
Chawl No.8, Room No.61, Sunder
Nagar, Mahakali Road, Opp.
Mahakali Temple, Andheri(East),
Bombay 400 093.

2. K.W.Thakre, Presiding Officer,
9th Labour Court, Bombay.

3. G.S.Baj, Member,
Industrial Court, Bombay. Respondents

Mr.J.P.Cama, senior counsel with Mr.Rajendra Sawant for the petitioner.

Mr.J.M.D'silva for the respondent no.1.

CORAM : B.H. MARLAPALLE,J.

DATED : 2nd September 2005

ORAL JUDGMENT:

This petition arises from the judgment and order rendered by the learned Judge of the 9th Labour Court at Mumbai on 3.12.1994 in Complaint (ULP) No.5/1990 and which came to be confirmed by the learned Member of the Industrial Court at Mumbai vide his judgment and order dated 5.8.1996 thereby dismissing Revision Application (ULP) No.1/1995 filed y the present petitioner under Section 44 of the Maharashtra Recognition of Trade

Unions & Prevention of Unfair Labour Practices Act, 1971

(For short, "the Act").

2. The petitioner is a consumer cooperative society duly registered under the Maharashtra Cooperative Societies Act, 1960 and it is providing services to the employees of M/s.Larsen & Toubro Limited. It is a society formed by the employees of M/s.Larsen & Toubro Limited. The respondent was engaged by the petitioner as a vendor with effect from 17.7.1979 and he was a case of chronic absenteeism. He remained absent without leave or intimation from 27.7.1988 and, therefore, was issued a chargesheet dated 18.8.1988. A domestic enquiry was instituted into the charges of unauthorised absence and the enquiry was concluded on 7.10.1988 in which the respondent had participated and the Enquiry Officer held that the charges were duly proved. The management proposed the punishment of dismissal and at this stage, the L & T Union President and the General Secretary of the Bharatiya Kamgar Sena, a recognised Union intervened and requested the petitioner to give one more chance to the respondent-employee for improvement of his attendance. The petitioner did agree with these representatives and in the presence of the respondent-employee it was decided that the dismissal order would be kept in abeyance so as to watch his attendance record for a further period of 12 months. It

was further agreed that if the respondent-employee would improve in his attendance that the petitioner would review and refrain from dismissing him.

3. However, the respondent again remained absent without leave or without any intimation for a period of 47 days during the period from 1.1.1989 to 16.11.1989. The petitioner, therefore, issued the dismissal order, kept in abeyance, on 16.11.1989.

4. The respondent challenged the said order of dismissal in complaint (ULP) No.5/1990 which was partly allowed by the Labour Court by holding that the petitioner was guilty of unfair labour practice inasmuch as the order of termination was not passed in good faith and it was passed in colourable exercise of the employer's right and the petitioner was guilty of dismissing the respondent-employee with undue haste. The respondent was directed to be reinstated without back wages, but with continuity in service from 16.11.1989. The petitioner challenged the order passed by the Labour Court in the revision application which came to be dismissed as noted little earlier. Thus, both the Courts below have held against the petitioner-employer. However, while admitting the petition on 4.12.1996, the operation of the impugned order was stayed by way of ad-interim relief which was

subsequently confirmed by an Order dated 5.2.1997. The reasoning given by this Court while granting stay to the impugned order reads as under:

> ". The service record of the respondent no.1 is hopeless. He was punished earlier for misconduct. Earlier his services were to be terminated. However, at the instance of Bharatiya Kamgar Sena Union, he was only suspended for some time. He was given chances to improve and to attend work regularly. But he failed. The chart produced by the petitioner shows that there was chronic absenteeism on the part of the respondent no.1. The chart is at page 35 of the petition. Prima facie, in my opinion, no sympathy should have been shown to such an employee."

5. The respondent-employee conceded before the Labour Court that the enquiry conducted and completed on 7.10.1988 was not vitiated on any ground and the enquiry was conducted in fairness was not challenged. In addition, the findings recorded by the Enquiry Officer were also not challenged. The Labour Court, therefore, held that the enquiry conducted against the workman was fair, proper and in accordance with the principles of natural justice. It further held that the findings of the Enquiry Officer were fair, proper and based on the evidence. The Labour Court further noted that the misconduct alleged and proved by the Enquiry Officer was also admitted by the plaintiff-workman. However, the Labour Court noted the contentions of the workman that the punishment of dismissal awarded to him was

shockingly disproportionate to the gravity of the offence.

6. The learned Judge of the Labour Court reproduced the attendance record as tabulated in the written statement and recorded a finding that the employee was absenting himself from work year after year for nearly one-third of the days available for work in every year from 1982 to 1989 and it further went to show that he was an incorrigible. The gist of the disciplinary actions taken against the complainant-employee was reproduced by the learned Judge of the Labour Court as under:

(a) Advisory memo issued in April 1980 for habitual absence.

(b) Advisory memo issued in August 1981 for habitual absence.

(c) Warning letter dated 6.5.1983 for habitual absence. (b)

(d) Punishment by way of suspension for one day as per the suspension order dated 28.9.1984.

(e) Warning letter dated 24.3.1985 for

habitual absence.

(f) Suspension order dated 10.12.1985 for two days on account of habitual absence.

(g) Suspension order dated 16.8.1986 for three days on account of habitual absence.

(h) Suspension order dated 14.1.1987 for four working days on account of habitual absence.

(i) During the period from 27.7.1987 to 13.9.1987 he remained absent continuously without intimation or leave and, therefore, disciplinary enquiry was conducted and based on the Enquiry Officer's finding, dismissal order dated 15.4.1988 was issued. However, the Union intervened and, therefore, the same punishment of dismissal was withdrawn and he was suspended for four days on the assurance given by the Union and the workman that he would improve his attendance.

7. Inspite of these opportunities having been granted

right from 1982 onwards, the respondent did not show any sign of improvement and on the contrary he remained absent without intimation from 27.7.1988 which followed by chargesheet dated 16.8.1988. The learned Judge of the Labour Court held the punishment of dismissal to be shockingly disproportionate in terms of the following findings:

> "It is not disputed that the respondent had taken lenient view several times on the request of the union and the respondent company granted him last chance to improve his attendance. But the complainant failed to utilise the same and therefore the respondents issued dismissal order on 16.11.89. Looking to the circumstances of the case I come to the conclusion that the punishment of dismissal is shockingly disproportionate looking to the gravity of the offence of misconduct i.e. absenteeism."

. The Industrial Court surprisingly in para 11 raised a question whether the past record which was produced for the first time at the revisional stage could be taken into consideration specially when no opportunity was given to the workman concerned to show cause as to why the same should not be taken into consideration for the purpose of passing severe sentence against him for the proved misconduct. The Industrial Court perhaps was of the view that before the dismissal order dated 16.11.1989 was passed, the petitioner-employer ought to have issued a show cause notice proposing to revoke the punishment of dismissal that was kept in abeyance.

. Surprisingly, the Industrial Court in paragraph 19 of its judgment made the following observations which imply its suggestion that the petitioner-employer was not guilty of unfair labour practice, " No doubt in this particular case in hand, the management was really very kind enough in taking merciful approach on number of occasions. It must be observed and stated to the credit of the employer that it never allowed to cross limits of tolerance. It is always shown mercy to the workman. However, by way of last and final chance, the workman deserves to be shown one more sympathy.".

8. Based on these observations, the Industrial Court recorded its conclusion that while reinstating the respondent-employee pursuant to the directions of the Labour Court, the management was free to deprive him of three increments while reinstating him in service, if so desired.

9. Mr.Cama, the learned senior counsel for the petitioner-employer rightly submitted that both the Courts below failed to record any reasons as to why the punishment of dismissal was termed as grossly disproportionate to the nature of charges proved. In fact, the findings of the Labour Court on the attendance record from 1982 to 1989 and its reproducing the past

actions of punishment on 9 different occasions, unfailingly proved that the respondent-employee was a case of chronic absenteeism and the number of opportunities granted to him had proved to be futile. This Court, in the case of Maharashtra State Road Transport Corporation, Nanded v. Bhimrao s/o.Ganpatrao Gundle, **1999 II CLR 926**, by referring to the decision in the case of U.P.State Road Transport Corporation & ors. v. Musai Ram & ors., **(1999) 3 SCC 372**, held thus, "It is well established that the Labour Court should not mechanically use the words "punishment being disproportionate to the charges'. The Labour Court is required to give reasons as to how the punishment is grossly disproportionate. The discretionary powers cannot be equated with the power of veto. Once the Labour Court evaluates the gravity of misconduct and considers the past record of service, it is true that the order of the Labour Court modifying the order of punishment or mounding the relief u/s. 11-A of the Industrial Disputes Act, should not be interfered by this Court. But such is not the case at hand. The award impugned, therefore, suffers from gross errors manifest on the face of the record and the award setting aside the order of dismissal by granting reinstatement with full back wages and consequential benefits cannot be sustained in the facts and circumstances of this case."

10. In the case of Director General, RPF & ors. v. CH.Sai Babu, **(2003) 4 SCC 331**, it has been held that normally the punishment imposed by a disciplinary authority should not be disturbed by the High Court or a tribunal except in appropriate cases that too only after reaching a conclusion that the punishment is grossly or shockingly disproportionate, after examining all the relevant factors including the nature of charges proved, the past conduct, penalty imposed earlier, the nature of duties assigned having due regard to their sensitiveness, exactness expected of and discipline required to be maintained and the department/establishment in which the delinquent person concerned works.".

. This Court in a series of judgements has held that the Labour Court in a complaint of unfair labour practice filed under the Act will not have jurisdiction to direct the employer to cease or desist from the unfair labour practice complained of unless the Court comes to the conclusion that the employer is indulging in or has indulged in an alleged act of unfair labour practice.

11. Item 1 of Schedule IV of the Act, so far relevant in the present case, is reproduced as under:

"1. To discharge or dismiss employees -

(b) not in good faith, but in the colourable exercise of the employer's rights;

.....

(g) for misconduct of a minor or technical character, without having any regard to the nature of the particular misconduct or the past record of service of the employee, so as to amount to a shockingly disproportionate punishment."

12. The misconduct of habitual absence from duty cannot be per se termed as a misconduct of a minor or technical character and in the instant case, the Labour Courts itself recorded a finding that the attendance record of the respondent-employee from 1982 to 1989 was dismal and that he as absenting himself from work year after year for nearly one-third of the days. It was also of the view that the respondent-employee was incorrigible. On the face of these observations, it was not permissible for the Labour Court to conclude that the punishment of dismissal is shockingly disproportionate looking to the gravity of the misconduct of absenteeism. This finding is nothing short of a veto and, thus, the Labour Court fell in manifest errors in recording such a finding without supporting the same by reasons.

13. The learned counsel for the respondent-employee on this issue referred to a decision of this Court in the case of Richardson & Cruddas (1972) Ltd. v.

Association of Engineering Workers & ors., **1996 I CLR 1079** and submitted that when both the Courts below found that the punishment was shockingly disproportionate to the misconduct attributed to the workman, there is no occasion for this Court to interfere with the concurrent view. In that case, the employee - a national football player - was charged of habitual absence from duty and in reply he had stated that he was not guilty of any misconduct as the days of absence were supported by medical certificates. The Labour Court, on reference, has held that the enquiry conducted against the workman was fair and proper, but the action of dismissal was unsustainable and, therefore, the workman was reinstated with continuity of service and full back wages. It is pertinent to note that the past record of service in the said case was not an issue and perhaps the employer was satisfied that the employee was not a case of chronic absenteeism. It was, under these circumstances, that the Labour Court invoked its discretionary powers under Section 11-A of the Industrial Disputes Act and set aside the punishment of dismissal and reinstated the employee by denying 50% back wages. So is not the case at hand. The employee has been given opportunities after opportunities and at times at the intervention of the recognised union, the punishment of dismissal once inflicted was withdrawn and modified. Thereafter he did not show any sign of improvement and was proceeded

against afresh. The enquiry was completed and an order of dismissal was passed in October 1988. But before it was issued the union intervened. It was agreed to keep the punishment under abeyance and watch him for about 12 months. During this period of observation and it was a period to show improvement, the employee remained absent without leave for 47 days and, therefore, the employer issued the order of dismissal which was kept in abeyance. The view taken by the Industrial Court that he was required to be issued a show cause notice is indefensible in the facts of this case. The rule of natural justice cannot be applied in a straight jacket formula and it has to be considered in the facts of each case. A second show cause was not required to be issued to the respondent-workman when the punishment of dismissal was kept in abeyance by an agreement between the employer, the recognised union and the employee. In the case of Delhi Transport Corporation v. Sardar Singh, **AIR 2004 SC 4161** the Supreme Court has held that the misconduct of absenteeism is serious enough warranting the punishment of dismissal.

14. Once the employer had invoked his managerial powers under the Model Standing Orders and awarded the punishment of dismissal, such an action cannot be interferred with unless the Tribunal records reasons and the said reasons are found to be in consonance with the

settled position in law. The Courts below failed on all these counts. This Court rightly noted while passing the interlocutory order the seriousness of the misconduct and the behaviour of the respondent-employee who did not deserve any sympathetic consideration. This is a fit case to set aside the impugned orders under the supervisory powers under Article 227 of the Constitution of India.

15. In the premises, this petition succeeds and the same is hereby allowed. The impugned order passed by the Labour Court and confirmed by the Industrial Court is hereby quashed and set aside. Complaint (ULP) No.5/1990 is dismissed. Rule is made absolute accordingly with no order as to costs.

(B.H. MARLAPALLE,J.)